93-423

No. 93-42

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1993

STAVROS KATSIS,

Petitioner,

vs.

UNITED STATES IMMIGRATION AND NATURALIZATION SERVICE,

Respondent.

Petition for Writ of Certiorari to the United States Court of Appeals for the Third Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether an applicant for relief from deportation under Section 212(c) of the Immigration and Nationality Act, 8 U.S.C. § 1182(c), is barred, as a question of law, from administrative reopening for consideration of material new evidence, an issue on which the courts of appeals are in direct conflict.

2. Whether a non-statutory federal board's interpretation of the deportation statute it administers requires judicial deference under this Court's holding in *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), where this Court itself has not granted such judicial deference in the interpretation of statutory language in deportation proceedings, *e.g., INS v. Cardoza-Fonseca*, 480 U.S. 421 (1987) and *INS v. Elias-Zacarias*, 112 S. Ct. 812 (1992).

3. Whether a court of appeals under this Court's holding in *Chevron, U.S.A. v. National Resources Defense Council, Inc.*, 467 U.S. 837 (1984), should defer to a decision of the Board of Immigration Appeals, an inferior nonstatutory administrative unit of the Department of Justice, in the interpretation of deportation laws, where the Attorney General, as the agent statutorily charged with interpretation and administration of the deportation laws, has issued a prior published administrative precedent to the contrary.

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1. August 9, 1993 Order of the Third Circuit denying rehearing;

2. July 6, 1993 Opinion and Order of the Third Circuit (not yet published) denying Petition for Review and affirming the Board of Immigration Appeals' Decision of September 16, 1992.

3. September 16, 1992 Decision and Order of the Board of Immigration Appeals, denying Petitioner's Motion to Reopen.

STATEMENT OF JURISDICTION

The judgment of the Court of Appeals for the Third Circuit was entered on July 6, 1993. A petition for rehearing was denied on August 9, 1993 and this Petition for Writ of Certiorari was filed within ninety days of that date. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

Section 101(a)(20) of the Immigration and Nationality Act, 8 U.S.C. § 1101(a)(20) provides:

> The term "lawfully admitted for permanent residence" means the status of having been lawfully accorded the privilege of residing permanently in the United States as an immigrant in accordance with the immigration laws, such status not having changed.

Section 212(c) of the Immigration and Nationality Act, 8 U.S.C. § 1182(c), provides in pertinent part:

> Aliens lawfully admitted for permanent residence who temporarily proceeded abroad voluntarily and not under an order of deportation, and who are returning to a lawful unrelinquished domicile of seven consecutive years, may be admitted in the discretion of the Attorney General without regard to the provisions of subsection (a) [defining classes of excludable aliens]. . . .

This section is interpreted to apply in deportation proceedings. The interpretation is national (July 6, 1993 Opinion of Third Circuit and authorities cited therein.) The applicability of this section is not in issue. The issue relates to the term "lawfully admitted for permanent resident", as defined by 8 U.S.C. § 1101(a)(20) and as used in § 1182(c).

STATEMENT OF THE CASE

Petitioner Stavros Katsis, a Greek national and citizen, was admitted to the United States as a lawful permanent resident on February 1, 1983. On March 29, 1988, he was convicted of a controlled substance violation. On the basis of this conviction, deportation proceedings were begun on January 4, 1989.

At trial, deportability was agreed. Petitioner filed for relief under Section 212(c) of the Immigration and Nationality Act, 8 U.S.C. § 1182(c), which permits aliens "lawfully admitted for permanent residence" and having "a lawful unrelinquished domicile of seven consecutive years" to apply for this discretionary relief from deportation. The Immigration and Naturalization Service ("INS") did not contest Petitioner's

statutory eligibility for § 212(c) relief. The issue presented was the appropriateness of the exercise of discretion. The Immigration Judge denied relief in the exercise of discretion, having first found Katsis statutorily eligible for that remedy.

A timely appeal was taken to the Board of Immigration Appeals ("Board"). The Board issued its decision denying relief on September 3, 1991.

Prior counsel petitioned for review of the Board's Order by the Court of Appeals for the Third Ciruit. On July 17, 1992 the Third Circuit affirmed the Board's decision, by unpublished Memorandum Opinion.

A Motion to Reopen Proceedings under 8 C.F.R. §§ 3.2 and 3.8 was submitted to the Board on August 17, 1992 by present counsel. The Board denied relief. Significantly, the Board acknowledged that there were important equitable factors which had arisen since the original hearing and which supported the exercise of discretionary relief. However, the Board now found Petitioner statutorily ineligible for this relief, holding:

> A respondent who is subject to an administratively final order of deportation cannot successfully move to reopen deportation proceedings to apply for relief under § 212(c) of the Act. As such, a respondent is no longer a lawful permanent resident of this country.

A Petition for Review of the Board's Order was timely filed with the Third Circuit Court of Appeals. It denied the Petition on July 6, 1993. A Petition for Rehearing was denied on August 9, 1993.

JURISDICTION IN THE COURT OF FIRST INSTANCE

Jurisdiction of the Court of Appeals below was based on 8 U.S.C. § 1105a(a) and this Court's holding in *Giova v. Rosenberg*, 397 U.S. 18 (1964) (Court of Appeals can review an order of the Board denying a motion to reopen an order of deportation, as a final order of deportation).

REASONS FOR GRANTING THE WRIT

I.

THE DECISION BELOW CONFLICTS WITH THE DECISIONS OF OTHER CIRCUITS REGARDING THE INTERPRETATION OF 8 U.S.C. §§ 1101(a)(20) and 1182(c), YIELDING OPPOSITE RESULTS DEPENDING SOLELY ON THE CIRCUIT IN WHICH A FINAL ORDER OF DEPORTATION IS REVIEWED.

Discretionary relief under Section 212(c) of the Act is available only to lawful permanent residents as defined by Section 101(a)(20) of the Act, 8 U.S.C. § 1101(a)(20). This status is accorded to any alien who has attained lawful permanent resident status, "such status not having changed." The "change" of this status is critical. If the status has not changed, the alien can apply to the Board for further consideration based on facts arising since the record was closed. The Board may then reopen the proceeding in its discretion. If the status has changed, the alien is no longer eligible for the remedy even though eligibility had been established by an application submitted at trial. In the instant case, the Board followed its prior decision in *Matter of Cerna*, Int. Dec. 3161, 1991 WL 353528 (BIA October 7, 1991), which held that the change in status took place when its own order became administratively final. The Board also suggested, by its language, that had it not so held as a question of law, it would have granted relief in this case.

The courts of appeal are markedly divided as to what event causes the loss of lawful permanent resident status in the context of interpreting Sections 101(a)(20) and 212(c). Some courts uphold the Board's "administratively final order of deportation" test. *See, e.g., Rivera v. INS*, 810 F.2d 540 (5th Cir. 1987); *Variamparambil v. INS*, 831 F.2d 1352 (7th Cir. 1987). However, the contrary view has prevailed in the Ninth and Seco d Circuits. *Butros v. INS*, 990 F.2d 1142 (9th Cir. 1993) (en banc); *Vargas v. INS*, 938 F.2d 358 (2d Cir. 1991).

In *Butros*, the Ninth Circuit overruled its prior holding in *Gonzalez v. INS*, 921 F.2d 236 (9th Cir. 1990) and "switched sides." *Butros* held that the provisions of 8 C.F.R. § 3.2 provide reopening to consider facts arising after the hearing, and therefore the Board's decision (that a deportable alien lost permanent resident status when the deportation order became administratively final) impermissibly contravened the regulation.

In the Eleventh Circuit, accrual of time for qualification, not in issue here, terminates with commencement of deportation proceedings. *Marti-Xiques v. INS*, 741 F.2d 350 (11th Cir. 1984). However, the issue of reopening of proceedings has not yet been reached by the Eleventh Circuit. From its position in *Marti-Xiques, supra*, and *Barbe v. INS*, 886 F.2d 306 (11th Cir. 1989), *cert. denied*, 495 U.S. 929 (1990), it appears that the Eleventh Circuit might agree with the reasoning in *Butros*.

In *Matter of Cerna* itself, the Eleventh Circuit never reached the instant issue on its merits. The case on which the Board relies was approved on wholly alternate grounds. *Cerna v. INS*, Nos. 91-5054 and 91-5055 (11th Cir. Nov. 9, 1992) (reproduced as Appendix D hereto).

Section 212(c) provides the only relief in deportation proceedings arising from controlled substance or weapons offenses.

It is available in the discretion of the Immigration Judge only to long-time permanent residents who demonstrate unusual equities: rehabilitation, dependent family, etc. Aliens residing in a state within the Second or Ninth Circuits can demonstrate these equities in any proceeding prior to physical deportation. But an alien who happens to reside in a state of the Third Circuit is barred from introducing such evidence once the Board has entered a final order, even if this order is appealed to the federal courts.[1] In the interim period, much may have changed in the alien's life, but as a matter of law it cannot be considered in the Third Circuit. The alien and his family must suffer the harsh consequences of deportation; the court is deprived of discretion.

In considering this Petition for Certiorari, it is significant that the Board itself attached a special appendix to its opinion in *Cerna*, critiquing the lack of uniformity among the circuits on this issue. Judge Trott, dissenting in *Butros v. INS*, 990 F.2d 1142 (9th Cir. 1993), lamented at length the conflict among the circuits. He too voiced a prayer that this Court would correct the problem that the "INS continues to be pulled in all directions at once by fractious circuits."

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1. It appears that if a court of appeals were to reverse a final order of the Board, the Board would consider lawful permanent resident status as reinstated, although there is no statutory basis for such reinstatement. This inconsistency of the Board's position is an issue to be addressed on the merits.

II.

THE COURT OF APPEALS HAS FAILED TO FOLLOW THIS COURT'S HOLDINGS IN *CARDOZA-FONSECA* AND *ELIAS-ZACARIAS*, IN THAT IT WHOLLY DEFERRED TO THE DECISION OF A NON-STATUTORY DEPARTMENTAL BOARD ON A QUESTION OF STATUTORY CONSTRUCTION.

An agency's interpretation of the statute it administers is subject to limited judicial review under *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). *Chevron* held that courts should defer to agency interpretations of the statutes committed to them for enforcement. *Chevron* was decided in 1984. It was followed by *INS v. Cardoza-Fonseca*, 480 U.S. 421 (1987). In deciding *Cardoza-Fonseca* in 1987, Justice Stevens for the Court cited *Chevron* beginning at page 446, but went on to focus on the authority of the Court as the final authority in issues of statutory construction involving clear congressional intent.

In *INS v. Elias-Zacarias*, 112 S. Ct. 812 (1992), this Court decided an important question of statutory interpretation relating to asylum in deportation proceedings; *Chevron* was neither mentioned nor even noted.

The treatment of *Chevron* in deportation cases such as *Cardoza-Fonseca* and *Elias-Zacarias* suggests that the application of *Chevron* is narrower than the Third Circuit has stated here.

Several commentators have noted the numerous exceptions to *Chevron*. Merrill, *Judicial Deference to Executive Precedent*, 101 Yale L.J. 969 (1992). Professor Merrill, analyzing *Chevron*-implicated cases decided by this Court between 1984 and 1990, found that only one-third of these decisions actually applied

Chevron. Id. at 981. He interprets *Cardoza-Fonseca* as avoiding *Chevron* where the issue is purely one of law.

The Court is invited to compare its decision in *INS v. Phynpathia*, 464 U.S. 183 (1984), decided earlier in the same term as *Chevron*. In *Phynpathia*, this Court not only did not defer to the same Board of Immigration Appeals; it overrode a long period of administrative interpretation as contrary to specific statutory language.

In *Matter of S.*, 6 I.&N. Dec. 392 (BIA 1954) (affirmed Attorney General March 15, 1955) on which Petitioner relied below, the Board's and the Attorney General's interpretation of § 101(a)(20) gave effect to congressional intent to preserve permanent resident status throughout deportation proceedings. That intent was clearly expressed at the time the United States immigration and nationality laws received intense and comprehensive congressional attention during the recodification resulting in the 1952 Act.

The case to which the Third Circuit defers, *Matter of Cerna*, Int. Dec. 3161, 1991 WL 353528 (BIA October 7, 1991), not only failed to consider that legislative purpose but held contrary to it. In its rush to do justice to *Chevron*, the Court of Appeals below failed to honor this Court's holding in *Cardoza-Fonseca*. *Cardoza-Fonseca* preserves the integrity of legislation as against agency interpretation where, as here, there is a conflict. *INS v. Elias-Zacarias*, 112 S. Ct. 812 (1992).

It is submitted that this Court's review is needed to end the apparent confusion as to the proper application of *Chevron* in the context of the issues decided in *Cardoza-Fonseca*, *Elias-Zacarias*, and perhaps *Phynpathia*.

III.

A CONSTRUCTION GIVEN TO THE IMMIGRATION AND NATIONALITY ACT BY THE ATTORNEY GENERAL SUPERSEDES AN INCONSISTENT CONSTRUCTION OF THAT STATUTE BY THE BOARD OF IMMIGRATION APPEALS, AND WARRANTS DEFERENCE, BOTH AS A MATTER OF STATUTORY CONSTRUCTION AND IN ACCORDANCE WITH THIS COURT'S HOLDING IN *CHEVRON.*

The Court of Appeals below applied the standard of review of agency statutory interpretation established by *Chevron, supra.* However, its application of *Chevron* is contrary to the administrative structure created by the Immigration and Nationality Act ("Act"). Unlike the administrative agency at issue in *Chevron*, the Board of Immigration Appeals was not established by the statute it administers and is not charged with enforcement of the Act. That responsibility is vested by 8 U.S.C. § 1103(a) in the Attorney General, specifically. The Board is a departmental entity created by the Attorney General. 8 C.F.R. § 3.1. That delegation of jurisdiction by the Attorney General in no way reduces her statutory authority as the officer responsible for administration of the immigration laws.

The Attorney General's construction of § 101(a)(20), and specifically the clause "such status not having changed", is that status as a lawful permanent resident is not lost until the alien voluntarily relinquishes that status or is physically deported. *Matter of S., supra.* The Attorney General has never overruled or retracted this construction of § 101(a)(20). The Board never sought the Attorney General's approval of its contrary position in *Cerna,* or in the instant case. *See* 8 C.F.R. § 3.1(h) providing for referral to the Attorney General.

As a creation of the Attorney General, the Board has no authority to interpret the Act contrary to the Attorney General's interpretation. The Board has done so in this case. If *Chevron* requires a reviewing court to defer to the "agency charged with enforcement", that agent to whom deference is due is the Attorney General. Instead, the Third Circuit deferred to the Board. This is contrary to the purpose and holding of *Chevron.*

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the Third Circuit in this case.

Respectfully submitted,

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September 15, 1993

APPENDIX A — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT DENYING REHEARING DATED AUGUST 9, 1993

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 92-3608

STAVROS KATSIS,

Petitioner

v.

IMMIGRATION & NATURALIZATION SERVICE,

Respondent

On appeal from the
Immigration & Naturalization Service

No. 91-3858

SUR PETITION FOR REHEARING
BEFORE ORIGINAL PANEL

BEFORE: GREENBERG, NYGAARD,and ROSENN, *Circuit Judges*

The petition for panel rehearing filed by petitioner Stavros Katsis in the above entitled case having been submitted to the judges who participated in the decision of this court, and no judge who concurred in the decision having asked for rehearing, the petition for rehearing is denied.

Appendix A

BY THE COURT:
s/ M. Greenberg
Circuit Judge

DATED: August 9, 1993

APPENDIX B — OPINION AND ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT DATED JULY 6, 1993 DENYING PETITION FOR REVIEW AND AFFIRMING THE BOARD OF IMMIGRATION APPEALS' DECISION OF SEPTEMBER 16, 1992

Filed July 6, 1993

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

NO. 92-3608

STAVROS KATSIS,

Petitioner

v.

IMMIGRATION & NATURALIZATION SERVICE,

Respondent

Appeal from the Immigration & Naturalization Service
No. 91-3858

Submitted Under Third Circuit Rule 12(6) June 11, 1993

Before: GREENBERG, NYGAARD,
and ROSENN Circuit *Judges*

Opinion Filed: July 6, 1993

Appendix B

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OPINION OF THE COURT

ROSENN, *Circuit Judge.*

In this case, an alien who was once lawfully admitted to the United States for permanent residence later became subject to an administratively final deportation order. After the entry of this final deportation order, the alien moved to reopen immigration proceedings to obtain discretionary relief from deportation. By statute, such relief is available only to aliens lawfully admitted for permanent residence. This petition for review presents the

question whether the Board of Immigration Appeals (BIA or Board) may deny as a matter of law a motion to reopen proceedings to obtain discretionary relief from deportation on the ground that the alien is no longer statutorily eligible for such relief because his status as an alien lawfully admitted for permanent residence changed when he became subject to an administratively final deportation order. Concluding that it may, we deny the petition for review.

I. BACKGROUND

Petitioner Stavros Katsis is a native and citizen of Greece. He was admitted to the United States as a lawful permanent resident in 1983. In 1988, he was convicted of a controlled substance violation, for which he served a prison term of approximately two years. Based on this conviction, in January 1989, Respondent Immigration and Naturalization Service (INS) commenced deportation proceedings against Katsis under section 241(a)(11) of the Immigration and Nationality Act (INA or Act), 8 U.S.C.A. § 1251(a)(11) (West 1970).

During a series of hearings in 1990 before various immigration judges (IJ), Katsis conceded deportability and applied for a waiver of deportability under section 212(c) of the Act, 8 U.S.CA. § 1182(c) (West 1993). Section 212(c) permits aliens "lawfully admitted for permanent residence" to apply for such a waiver. In November 1990, the IJ found Katsis deportable. At that same time, although finding Katsis to be statutorily eligible for a section 212(c) waiver, the IJ denied him the requested waiver on discretionary grounds after determining that the considerations favorable to permitting Katsis to remain in this country did not outweigh his conviction for a serious drug offense.

Appendix B

The IJ's finding of deportability was never appealed; however, in November 1990, Katsis appealed to the Board the IJ's denial of the section 212(c) waiver. The Board affirmed in September 1991. Katsis does not dispute the INS's assertion that he became subject to an administratively final deportation order when the Board affirmed the IJ's decision. Katsis petitioned this court for review of the Board's decision, and in an unpublished memorandum opinion, we affirmed. *Katsis v. INS*, 972 F.2d 1331 (3d Cir. 1992) (Rosenn, J.).

In August 1992, Katsis submitted a motion to the Board to reopen proceedings under 8 C.F.R. §§ 3.2 and 3.8. The motion set forth the existence of "new evidence that would serve to bolster his equities for a discretionary determination under section 212(c)" as required under those regulations. *In re Katsis*, BIA File No. A37 588 636, slip op. at 3 (Sept. 16, 1992). The Board denied this motion as a matter of law without reaching the discretionary aspect of the statute because it determined that Katsis was statutorily ineligible for waiver at the time he submitted his motion to reopen. *Id.* The Board so determined because it deemed he was no longer an alien "lawfully admitted for permanent residence" at the time he filed his motion to reopen, as required by section 212(c), in that he was then subject to an administratively final order of deportation.

Katsis timely filed a petition for review of this denial in this court.[1]

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1. The Board exercised jurisdiction over Katsis's motion to reopen pursuant to 8 U.S.C.A. § 1103 (West Supp. 1993); *Wolf v. Boyd*, 238 F.2d 249, 256 (9th Cir. 1956), *cert. denied*, 353 U.S. 936 (1957). This court exercises jurisdiction to review the Board's decision pursuant to 8 U.S.C.A. § 1105a(a) (West 1970 & Supp. 1993).

Appendix B

II. DISCUSSION

A. Standard of Review

Resolution of this case depends on application of the proper standard of review for the Board's construction of INA provisions. The Supreme Court clearly set forth the framework for review of an agency's construction of the statute it administers in *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984).

As background, the Court stated, " 'The power of an administrative agency to administer a congressionally created . . . program necessarily requires the formulation of policy and the making of rules to fill any gap left, implicitly or explicitly, by Congress.' " *Chevron*, 467 U.S. at 843 (omission in original) (citing *Morton v. Ruiz*, 415 U.S. 199, 231 (1974)). When, as here, Congress has implicitly delegated authority to an agency on a particular question, i.e., where it has left a gap without *expressly* delegating "authority to the agency to elucidate a specific provision of the statute by regulation[,] . . . a court may not substitute its own construction of a statutory provision for a reasonable interpretation made by the administrator of an agency." *Id.* at 843-44 (footnotes omitted). Under a well settled principle of deference, "considerable weight should be accorded to an executive department's construction of a statutory scheme it is entrusted to administer." *Id.* at 844 (footnote omitted). *See also Udall v. Tallman*, 380 U.S. 1, 16 (1964) ("When faced with a problem of statutory construction, this Court shows great deference to the interpretation given the statute by the officers or agency charged with its administration.").

Thus, "when a court reviews an agency's construction of the

statute it administers, it is confronted with two questions." *Id* at 842.

> First, always, is the question whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress. If, however, the court determines Congress has not directly addressed the precise question at issue, the court does not simply impose its own construction on the statute, as would be necessary in the absence of an administrative interpretation. Rather, if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute.

Id at 842-43 (footnotes omitted). *See also Butros v. INS*, 990 F.2d 1142, 1148-49 (9th Cir. 1993) (en banc) (Trott, J., dissenting).[2]

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2. Under *Chevron*, our review of the BIA's construction of the INA should parallel our review of the National Labor Relations Board's (NLRB) construction of the National Labor Relations Act (NLRA) insofar as each construction is that of an agency construing its own statute. We have stated in the labor context:

> [W]hen reviewing [NLRB] orders the court must address three discrete issues. First, the court determines whether the NLRA provides a clear rule to be applied in the case, and if so, whether the [NLRB] complied with the Act. If no clear rule is provided, the court then determines

(Cont'd)

In sum, "the courts must respect the interpretation of the agency to which Congress has delegated the responsibility for administering the statutory program," *INS v. Cardoza-Fonseca*, 480 U.S. 421, 488 (1987) (citations omitted), unless that interpretation is "arbitrary, capricious, or manifestly contrary to the statute." *Chevron*, 467 U.S. at 844. *See also Butros*, 990 F.2d at 1149 (Trott, J., dissenting).

B. Applicable Law

Motions to reopen immigration proceedings "are disfavored for the same reasons as are . . . motions for a new trial on the basis of newly discovered evidence." *INS v. Doherty*, 112 S. Ct. 719, 724 (1992). There are three grounds upon which the Board may deny a motion to reopen: (1) failure to establish a *prima facie* case for the relief sought; (2) failure to introduce previously unavailable, material evidence; and (3) a determination that even if these requirements were met, the movant would not be entitled to the discretionary relief sought. *Id* at 725. This case turns on the first ground, where such a *prima facie* showing encompasses a showing of statutory eligibility for relief under section 212(c) of the Act.

Section 212(c) of the Act provides in pertinent part:

(Cont'd)

> whether the NLRA permits the [NLRB] order that is the subject of the appeal. Finally, if the [NLRB] order is permissible, the court must review NLRB precedent to determine whether that order is consistent with such precedent.

NLRB v. New Jersey Bell Tel. Co., 936 F.2d 144, 147-48 (3d Cir. 1991).

Appendix B

> Aliens lawfully admitted for permanent residence who temporarily proceeded abroad voluntarily and not under an order of deportation, and who are returning to a lawful unrelinquished residence of seven consecutive years, may be admitted in the discretion of the Attorney General without regard to the provisions of subsection (a) of this section [which provides a list of excludable aliens]. . . .

8 U.S.C.A. § 1182(c). On its face, this statute does not seem to apply to Katsis's case, as the facts here do not involve his leaving the country. Under case law, however, this discretionary relief may be extended to deportable aliens who have not exited the United States. *Tapia-Acuna v. INS*, 640 F.2d 223, 224-25 (9th Cir. 1981); *Francis v INS*, 532 F.2d 268, 272-73 (2d Cir. 1976); *Matter of Silva*, 16 I. & N. Dec. 26 (BIA 1976).

The term "lawfully admitted for permanent residence" is defined at section 101(a)(20) of the Act to mean "the status of having been lawfully accorded the privilege of residing permanently in the United States as an immigrant in accordance with the immigration laws, *such status not having changed.*" 8 U.S.C.A. § 1101(a)(20) (West 1970) (emphasis added). This is the statutory provision the Board has interpreted in order to rule on Katsis's motion to reopen proceedings to obtain discretionary relief under section 212(c).

Katsis fails to identify any express congressional pronouncements on the issue of what will be deemed to trigger a change in an alien's status as a lawful permanent resident under section 101(a)(20) for purposes of section 212(c); independent

inquiry has similarly revealed no congressional guidance in this matter. Whatever the Board's interpretation, then, it cannot be manifestly contrary to the statute. We must therefore proceed to the second question set forth in *Chevron*. Thus, the issue in this case is whether the Board's interpretation of section 101(a)(20) in the context of section 212(c), which deems the status of a lawfully admitted resident alien to have changed upon entry of an administratively final deportation order and which merits substantial deference, is permissible, i.e., not arbitrary or capricious.[3]

C. The Board's Interpretation of Section 101(a)(20)

To determine whether the Board's interpretation of section 101(a)(20) is permissible, we first examine what the Board has done and its reasons for doing so. In determining an alien's statutory eligibility for section 212(c) relief, the Board has considered the interplay between section 212(c) and section 101(a)(20) in the context of two separate issues. The first is a threshold issue of whether the alien has accrued the requisite seven consecutive years of unrelinquished domicile to be statutorily eligible for section 212(c) relief; the second issue is whether, even if the accrual requirement is met, the alien is nonetheless precluded from obtaining section 212(c) relief because the alien's status as a lawful permanent resident changed before he or she filed a motion to reopen proceedings to obtain such relief.

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3. If the Board's interpretation of section 101(a)(20) in the context of section 212(c) is permissible. Then, if requested, we would review its determination of an alien's statutory eligibility under that permissible interpretation for abuse of discretion. *See Doherty*, 112 S. Ct. at 725 (abuse of discretion is proper standard of review when denial of motion to reopen is based on movant's failure to establish a *prima facie* case for the relief sought). Katsis does not raise this issue in his petition for review, however, and therefore it is not before this court.

Appendix B

In *Matter of Lok*, 18 I. & N. Dec. 101 (BIA 1981), *aff'd on other grounds*, 681 F.2d 107 (2d. Cir. 1982), the Board addressed the threshold issue of accrual. Because the accrual period of seven years lawful residence would terminate if and when the alien's status as a lawful permanent resident changed, the Board framed the issue in general terms as follows: "At what point in the deportation proceedings does the status of an alien lawfully admitted for permanent residence come to an end?" *Id* at 105. The Board carefully examined the deportation process and identified four stages "at which the status of an alien 'lawfully admitted for permanent residence' may be considered to have changed within the meaning of Section 101(a)(20) of the Act," *id.*:

> (1) upon the immigration judge's initial determination of deportability, (2) when the immigration judge's order becomes administratively final, (3) when a United States Court of Appeals acts upon a petition for review of the Board's order or the time allowed for filing such petition expires, or (4) only upon the execution of the deportation order by the alien's departure, voluntary or enforced, from this country.

Id.

Before addressing each possibility, the Board noted that the mere occurrence of an act or event providing a basis for deportation is insufficient to change the alien's status as a lawful permanent resident under section 101(a)(20). *Id* at 106. It then determined that termination of such status upon an IJ's initial adjudication of deportability would be premature because the alien has a right to appeal to the Board for *de novo* review of fact and law. *Id.*

The Board declined, however, to adopt the position that an alien present in this country under a final deportation order remains a lawful permanent resident until the order is executed, finding such a proposition inherently incongruous. *Id.; see also Lok v. INS*, 681 F.2d 107, 110 (2d Cir. 1982) (after deportation order becomes final, alien resides in United States "as a matter of grace, not law"). It further concluded that lawful permanent resident status ought not continue through the process of judicial review after the entry of an administratively final deportation order because (1) authority to adjudicate deportability is vested primarily in the Attorney General and his delegates, the IJ and the Board; and (2) judicial review, in contrast to the Board's *de novo* review, is generally limited to ascertaining whether the order is supported by reasonable, substantial, and probative evidence of record. *Lok*, 18 I. & N. Dec. at 107. Additionally, the Board observed that to hold that an alien subject to a final deportation order remains a lawful permanent resident throughout judicial proceedings following the entry of a final deportation order would encourage spurious petitions to the circuit courts for review, filed for the sole purpose of accumulating more time toward section 212(c) eligibility. *Id.*

The Board finally held as follows:

> [T]he policies of the Act would best be served by deeming the lawful permanent resident status of an alien to end with the entry of a final administrative order of deportation generally, when the Board renders its decision in the case upon appeal or certification or, where no appeal to the Board is taken, when appeal is waived or the time allotted for appeal has expired.

Id. at 105 (citations omitted). Thus, the Board clearly articulated the principle upon which it decided the case and the reasons why it adopted the principle.[4]

Several years after the Board issued its decision in *Lok*, the Board applied the *Lok* rule to an alien's motion to reopen proceedings to obtain section 212(c) relief in *Rivera v. INS*, 810 F.2d 540 (5th Cir. 1987). *Rivera* is therefore analogous to the present case. As in the instant case, the alien, who had once been admitted to the United States as a lawful permanent resident, did not move to reopen deportation proceedings to obtain discretionary relief under section 212(c) until he was already subject to an administratively final deportation order. The Board deemed the alien's status as a lawful permanent resident of this country changed by the administratively final deportation order, which resulted in the alien's statutory ineligibility for section 212(c) relief and the consequent denial of his motion.

On petition for review, the Court of Appeals for the Fifth Circuit initially failed to accord deference to the Board's interpretation; it therefore rejected the Board's reliance on *Lok* and remanded the case. *Rivera v. INS*, 791 F.2d 1202, 1206-07 (5th Cir. 1986), *vacated on reconsideration*, 810 F.2d 540 (5th Cir. 1987). On reconsideration, however, the court reversed itself, stating, "[W]e are persuaded that the Board's interpretation of the [INA] is not unreasonable; given the 'great deference' we must accord the [Board's] interpretation of that Act, we accept its interpretation and affirm its order." *Rivera v. INS*, 810 F.2d 540, 540 (5th Cir. 1987). The court specifically noted that "[t]he [Board's] *Lok* opinion,

4. Further the Board specifically addressed prior decisions suggesting a contrary holding by distinguishing them because they did not present the same issue for determination and by declaring them superseded to the extent any conflict may exist. *Id.* at 106-07.

which the Board carefully followed in the instant case, reflects careful consideration of the solution to the problem of when lawful residence in this country should terminate. We find nothing unreasonable about the BIA's rationale or its conclusion." *Rivera*, 810 F.2d at 541. The court concluded that the BIA's interpretation was not only fair, but conserves the resources of an already beleaguered Board" and "prevents the alien from stringing out his claims and delaying the ultimate disposition of his case." *Id.*

In at least seven subsequent cases, the Board has consistently applied the *Lok* rule to motions to reopen proceedings to obtain section 212(c) relief.[5] In the first case not reviewed by the Court of Appeals for the Fifth Circuit, *Gonzales v. INS*, 921 F.2d 236 (9th Cir. 1990), *overruled by Butros*, 990 F.2d 1142 (9th Cir. 1993), the Court of Appeals for the Ninth Circuit upheld the Board's denial, based on *Lok* of an alien's motion to reopen that was filed after the alien became subject to an administratively final deportation order. In the second case, *Vargas v. INS*, 938 F.2d 358 (2d Cir. 1991), the court rejected the Board's application of the *Lok* rule to motions to reopen. In the third case, *Matter of Cerna*, Int. Dec. 3161, A-30257519, 1991 WL 353528 (BIA Oct. 7, 1991), the Board cited *Lok*, *Rivera*, and *Gonzales* in denying an alien's motion to reopen and the alien sought no judicial review of that denial. In the fourth case, *Butros v. INS*, 990 F.2d 1142 (9th Cir. 1993) (en banc), the Court of Appeals for the Ninth Circuit revisited and rejected the application of *Lok* to motions to reopen, thereby overruling

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5. In three of these cases, the Court of Appeals for the Fifth Circuit, citing its decision in *Rivera*, affirmed the Board's application of the *Lok* rule to motions to reopen to obtain section 212(c) relief *Prichard-Ciriza v. INS*, 978 F.2d 219, 222-23 (5th Cir. 1992); *Ghassan v. INS*, 972 F.2d 637-38 (5th Cir. 1992), *cert denied*, 113 S. Ct. 1412 (1993); *Garcia Hernandez v. INS*, 821 F.2d 222, 224 (5th Cir. 1987). In each of these cases, the Board's application of the *Lok* rule resulted in the denial of the alien's motion for the same reasons the motion was denied in the present case.

Gonzales. We specifically note, however, that in both *Vargas* and *Butros* the courts failed to review the Board's interpretation of its own statute under the deferential standard that the Supreme Court articulated so clearly in *Chevron.*

Under *Chevron,* the court cannot substitute its preferred interpretation of section 101(a)(20) with the Board's if the Board's is permissible, i.e., not arbitrary or capricious. *Chevron,* 467 U.S. at 843-44 & n.11. If for no other reason than ease of application, it is reasonable to attempt to establish one single standard for the time an alien's lawful permanent resident status changes for all purposes under section 212(c). *See Cerna,* 1991 WL 353528, at *15 ("Our interpretation of the law [under *Lok*] established a rather straightforward test in an area of the law which is particularly contorted").

Furthermore, the standard itself is reasonable. As applied in the present case, it fairly gave Katsis an additional 10 months to discover any material evidence not available at the time the IJ originally found he was deportable and denied his application for a section 212(c) waiver. Keeping in mind that motions to reopen are disfavored, *Doherty,* 112 S. Ct. at 724, the Board's interpretation establishes a clear cut-off date that in effect operates like a statute of limitations to set the last day upon which an alien can establish statutory eligibility for section 212(c) relief on a motion to reopen proceedings.

This unambiguous cut-off date discourages unnecessary and prolonged litigation by its very clarity, promotes finality, and avoids adjudication of state claims as all statutes of limitations do. It also allows the Board, on *de novo* appeal from an IJ's decision to deny an alien a section 212(c) waiver, to examine all the evidence relevant to a grant of discretionary relief under section 21 2(c) at

one time, rather than in two separate proceedings. In a like manner, it operates to limit the circuit courts' exposure to multiple petitions for review, as we have had in this very case.

Moreover, it sets the last day through which an alien can manipulate deportation proceedings by his or her after-the-fact manufacture of additional evidence of equities to balance the adverse factor or factors he or she must overcome to receive discretionary relief under section 21 2(c).[6] Under the Board's

6. Section 3.2 of the regulations. entitled "Reopening or reconsideration," provides in pertinent part:

> Motions to reopen in deportation proceedings shall not be granted unless it appears to the Board that evidence sought to be offered is material and was not available and could not have been presented at the former hearing; nor shall any motion to reopen for the purpose of affording the alien an opportunity to apply for any form of discretionary relief be granted if it appears that the alien's right to apply for such relief was fully explained to him and an opportunity to apply therefor was afforded him at the former hearing *unless the relief is sought on the basis of circumstances which have arisen subsequent to the hearing.*

8 C.F.R. § 3.2 (emphasis added). Katsis points to the emphasized language to show that motions to reopen are specifically intended to take into account after-the-fact evidence. We disagree. Motions to reopen are specifically intended to take into account material evidence that was not available and therefore could not have been presented at the former hearing. The emphasized language comes into play under the indicated circumstances to *restrict* the evidence that may be presented on a motion to reopen if an alien failed to apply for discretionary relief during earlier proceedings. In this context, although the restriction acknowledges that evidence manufactured after the fact may be used to support a motion to reopen, it is hardly a rousing encouragement for or approval of such tactics.

precedent in *Matter of Marin*, 16 I. & N. Dec. 581 (BIA 1978), "the adverse factors evidencing an alien's undesirability as a permanent resident" must be weighed against "the social and humane considerations presented in his behalf to determine whether the granting of section 212(c) relief appears in the best interest of this country." *Marin*, 16 I. & N. Dec. at 584. These social and humane considerations, or equities, are measured by examining evidence considered favorable to the exercise of section 212(c) discretion.

Some of these favorable considerations, by their very nature, cannot be created or materially augmented after a final deportation order has been entered. For example, an alien who entered the United States as an adult cannot alter history to gain the additional equity that would accompany entry as a young child. *Id.* at 584-85. Other favorable considerations, however, can, on the alien's own initiative or following advice of counsel, be systematically manufactured or significantly augmented during whatever time an alien manages to remain in this country through diligent efforts to keep alive immigration proceedings regarding his or her deportation. These considerations include:

> [F]amily ties within the United States, . . . evidence of hardship to the [alien] and family if deportation occurs, service in this country's Armed Forces, a history of employment, the existence of property or business ties, evidence of value and service to the community, proof of a genuine rehabilitation if a criminal record exists, and other evidence attesting to [an alien's] good character (e.g., affidavits from family, friends, and responsible community representatives).

Id. Marin is, in effect, a blueprint for crafting a set of circumstances to overcome adverse factors in an discretionary determination under section 212(c).

An alien's continuing ability to manufacture such evidence, whether legitimate or not, and the consequent incentive to file spurious petitions for review in the circuit court to extend the time for such manufacture, is a legitimate concern addressed by application of the *Lok* rule.[7] Surely an alien subject to an administratively final deportation order cannot be heard to complain that he or she is in any way prejudiced by the Board's refusal to consider activities engaged in after that order became final. At that point the alien is clearly on notice that he or she may soon be departing this country.

In summary, the Board's interpretation establishes a standard that provides an alien with a fair amount of time to uncover legitimate evidence that was unavailable when the IJ originally denied a requested section 212(c) waiver. This standard at the same time reduces the incentive for an alien to string out his or her claims to avoid the ultimate disposition of the case, "where, as a general matter, every delay works to the advantage of the deportable alien who wishes merely to remain in the United States." *Doherty*, 112 S. Ct. at 724-25. As a consequence, the Board's standard (1)

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7. The *Vargas* court rejected the application of *Lok* to motions to reopen in part because it concluded that "[t]he concern which motivated the creation of the rule in *Matter of Lok* — preventing an alien from manipulating deportability proceedings so as to acquire seven years of domicile — is not present here." *Vargas*, 938 F.2d at 361. We conclude, however that insofar as application of the *Lok* rule prevents an alien from manipulating deportation proceedings so as to acquire or enhance his or her equities under section 212(c) in an after-the-fact manner the concern which motivated the creation of the *Lok* rule also supports its application to motions to reopen as a " 'product of reasoned decision-making.' " *Id.* (citations omitted).

discourages unnecessary litigation and promotes finality; (2) reduces both Board and circuit court exposure to multiple, piecemeal requests for consideration of one kind or another; and (3) reduces the incentive to file meritless petitions for review in the circuit courts, which lessens the burdens on those courts, just to buy the alien more time to create after-the-fact evidence of equities. For all these reasons, the Board's interpretation of section 101(a)(20) in the context of section 212(c) relief is reasonable, and not arbitrary or capricious, and therefore it is a permissible interpretation of the statute. *Butros*, 990 F.2d at 1150; *Rivera*, 810 F.2d at 541.

Katsis asserts that the Board's interpretation is internally inconsistent because the standard it establishes renders him ineligible to file a motion to reopen, but not one to reconsider. The INS contends that the difference is logical given the goals each motion sets out to accomplish. We note that motions to reopen and motions to reconsider are the creations of regulation and not statute. *See Doherty*, 112 S. Ct. at 724. Nonetheless, "deference is required whether an agency is interpreting the statute directly . . . or through a rule or regulation promulgated thereunder. *ALM Corp. v. United States EPA, Region II*, 974 F.2d 380, 383 (3d Cir. 1992), *cert. denied*, 113 S. Ct. 1412 (1993). Therefore, on review we defer to an agency's construction of its own regulation, 'unless it is plainly erroneous or inconsistent with the regulation.' " Beazer *E., Inc. v. United States EPA, Region III*, 963 F.2d 603, 606 (3d Cir. 1992).[8]

A motion for reconsideration looks for error in the proceedings based on the factual record as it stands and is successful only if a defect is found in the original decision. If error

8. Katsis does not dispute the INS's interpretation of the INA to allow motions to reopen and to reconsider.

is found in a Board determination that an alien is deportable and undeserving of section 212(c) relief, reversal nullifies the finality of the deportation order and the consequent status change as well. Given that the deportation order cannot stand where such an error has been made, there is no reason to allow the deportation order to preclude a motion for reconsideration.

On the other hand, an alien is required to introduce new evidence in order to move to reopen proceedings, which introduction generally requires a new hearing and creates a different factual record on which to base either a redetermination of deportability or eligibility for section 212(c) relief or both. The policy concerns in favor of finality loom much larger in this context than in the context of a motion to reconsider because no error is asserted. Absent some sort of obstruction by the INS of an alien's ability to collect evidence not alleged here, the Board should be permitted to determine essentially this: if it takes longer than the period between the IJ's determination of deportability and ineligibility for section 212(c) relief and the Board's affirmance of that determination for an alien to find (or create) new evidence, either (1) the alien has not been sufficiently diligent in his efforts, (2) the probabilities do not favor the existence of material evidence unavailable at the time of the IJ's decision, (3) any such evidence that may exist is stale, or (4) the alien should be given no more time to create evidence after the fact. We find nothing inconsistent in the Board's approach to these two types of motions, and its decision to distinguish between the two is reasonable.

Finally, Katsis suggests that the Board's reading of the statutes in question contradicts the right to reopen granted by 8 C.F.R. § 3.2. The regulation, however, cannot provide a right broader than that which is provided by a necessarily implicated statute. Section 212(c) contains pertinent language limiting its application

to aliens "lawfully admitted for permanent residence." Section 101(a)(20) defines that term to exclude aliens who once were lawfully admitted for permanent residence but whose status has since changed. Congress left it to the Attorney General to interpret that language, and the Board, as the delegate of the Attorney General, has done so in a permissible fashion. The Board's permissible interpretation articulates the contours of the section 212(c) restriction pertinent here, and those contours cannot be said to contradict the INS regulations that create and govern motions to reopen. Rather, the regulations must be read, if possible, to conform to statutory mandates, and the Board has done so here. Therefore, its interpretation of its own regulations is not clearly erroneous or inconsistent with those regulations.

III. CONCLUSION

The Board interprets section 101(a)(20) in the context of section 212(c) relief to mean that an alien's status as a lawful permanent resident changes when he or she becomes subject to an administratively final deportation order. This interpretation in the specific context of motions to reopen proceedings to obtain section 212(c) discretionary relief from deportation results in an alien's statutory ineligibility for such relief if the motion is filed after the alien becomes subject to such a final deportation order. This interpretation is a reasonable and, thus, a permissible construction of the statute. Because it is a permissible construction of the statute, this court will not disturb it.

Application of the Board's interpretation of section 101(a)(20) in the instant case results in a determination that Katsis was statutorily ineligible for discretionary relief under section 212(c) at the time he filed his motion to reopen proceedings to obtain such relief because he was then subject to an administratively final

deportation order. Therefore, he was no longer a lawful permanent resident as is expressly required by section 212(c).

Accordingly, the Board's denial as a matter of law of Katsis's motion to reopen proceedings to obtain section 212(c) relief is consistent with its interpretation of the INA and will be affirmed. The petition for review will therefore be denied.

Each side to bear its own costs.

A True Copy:
Teste:

Clerk of the United States Court of Appeals
for the Third Circuit

APPENDIX C — DECISION AND ORDER OF THE BOARD OF IMMIGRATION APPEALS DENYING PETITIONER'S MOTION TO REOPEN DATED SEPTEMBER 16, 1992

U.S. Department of Justice
Executive Office for Immigration Review

Falls Church, Virginia 22041

Decision of the Board of Immigration Appeals

File: A37 588 636 - Philadelphia Date: SEP 16 1992

In re: STAVROS *KATSIS*

IN DEPORTATION PROCEEDINGS

MOTION

ON BEHALF OF RESPONDENT:

James J. Orlow, Esquire
Orlow and Orlow, P.C.
Sixth and Chestnut Streets
1154 Public Ledger Building
Philadelphia, Pennsylvania 19106

ON BEHALF OF SERVICE:

Richard J. Sharkey
District Counsel

CHARGE:

Order: Sec. 241(a)(11), I&N Act [8 U.S.C. § 1251(a)(11)] - Convicted of controlled substance violation

APPLICATION: Reopening

Appendix C

In a decision dated November 6, 1990, an immigration judge found the respondent deportable as charged, denied his application for a waiver of inadmissibility under section 212(c) of the Immigration and Nationality Act, 8 U.S.C. § 1182(c), and ordered him deported from the United States to Germany or Greece. The Board dismissed the respondent's appeal from this decision on September 3, 1991. On August 19, 1992, the respondent filed a motion to reopen. The motion will be denied.

A motion to reopen must, among other things, state the new facts to be considered at the reopened hearing and must be supported by previously unavailable, material evidence. *See* 8 C.F.R. § 3.2. The alien also must establish prima facie eligibility for the relief sought before a motion to reopen will be granted. *INS v. Doherty*, __ U.S. __, 112 S. Ct. 719 (1992); *INS v. Abudu*, 485 U.S. 94 (1988); *INS v. Jong Ha Wang*, 450 U.S. 139 (1981) (per curiam); *Matter of Ruiz*, Interim Decision 3116 (BIA 1989). The Board has discretion to deny a motion to reopen even if the alien has made out a prima facie case for relief. *INS v. Doherty, supra.* Moreover, a party who seeks to reopen proceedings bears a "heavy burden" of proving that if the proceedings before the immigration judge were reopened, the new evidence would likely change the result in the case. *Matter of Coelho*, Interim Decision 3172 (BIA 1992); *see INS v. Doherty, supra; INS v. Abudu, supra.*

An applicant for relief under section 212(c) of the Act must be a lawful permanent resident of the United States and must have a lawful unrelinquished domicile of 7 consecutive years. *See* section 212(c) of the Act; *Gonzalez v. INS*, 921 F.2d 236, 238 (9th Cir. 1990). A respondent who is subject to an administratively final order of deportation cannot successfully move to reopen deportation proceedings to apply for relief under section 212(c) of the Act as such a respondent is no longer a lawful permanent

resident of this country. *Matter of Cerna,* Interim Decision 3161 (BIA 1991). In the present case, the respondent is no longer a lawful permanent resident of this country as his status as such ended upon the Board's dismissal of his appeal. The September 3, 1991, decision of the Board provided a final administrative order of deportation. *See* section 101(a)(20) of the Act, 8 U.S.C. 1101(a)(20) (1988); *Rivera v. INS,* 810 F.2d 540 (5th Cir. 1987); *Matter of Lok,* 18 I&N Dec. 101 (BIA 1981), *aff'd on other grounds, Lok v. INS,* 681 F.2d 107 (2d Cir. 1982); *see also* 8 C.F.R. §§ 3.37, 242.20, 243.1 (1992).

On appeal, the respondent suggests that the Board's decision in *Matter of Cerna, supra,* should be reconsidered. He notes that motions are discretionary determinations (*See* 8 C.F.R. §§ 3.2 and 3.8), and argues that the Board's policy, which precludes a motion to reopen in section 212(c) cases as a matter of law, fails to even consider the discretionary factors. The respondent suggests that the Board lacks regulatory authority to make such a discretionary distinction absent an express change in the regulations. Finally, he maintains that because he has already demonstrated prima facie eligibility in the underlying proceedings, adjudication of the motion should focus solely on discretionary aspect of that relief.

We find the respondent's arguments to be unpersuasive. The regulatory provisions cited by the respondent at 8 C.F.R. § 3.2 and 3.8, provide for the denial of a motion in the absence of previously unavailable material evidence. Nevertheless in addition to this regulatory power to deny the motion, the Supreme Court has held that the Board also may deny a motion either based either on a failure to demonstrate prima facie eligibility for the relief sought or as a matter of discretion. *INS v. Doherty, supra* at 725. We therefore find no support for the respondent's assertion that the Board must enter into a discretionary determination in adjudicating a motion to

reopen. In addition, there is no authority to support the respondent's assertion that his ability to demonstrate prima facie eligibility in the underlying proceeding guarantees his continued eligibility when seeking to reopen the proceedings.

For the reasons we enunciated in *Matter of Cerna, supra,* and *Matter of Lok, supra,* barring a reversal on the merits of the respondent's deportability finding by an appellate court or administratively,[1] the respondent lost his status as a lawful permanent resident on September 3, 1991, upon the entry of a final Board decision. Thus, he is no longer statutorily eligible for relief under section 212(c). *Matter of Cerna, supra; Gonzalez v. INS, supra.*

We note that the respondent's motion contains new evidence that would serve to bolster his equities for a discretionary determination under section 212(c) of the Act. Nevertheless, considering his statutory ineligibility for relief, we find it unnecessary to review this evidence.

Accordingly, the following order will be entered.

ORDER: The motion is denied.

s/ Mary Maguire Dunne
FOR THE BOARD

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1. The respondent apparently sought review of the Board's order by filing a Petition for Review in the United States Court of Appeals for the Third Circuit. However, the court upheld the Board's decision (Respondent's brief at 2).

APPENDIX D — PER CURIAM OPINION AND ORDER OF THE ELEVENTH CIRCUIT AFFIRMING THE ORDER OF THE BOARD OF IMMIGRATION APPEALS IN *CERNA v. INS* FILED NOVEMBER 9, 1992

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

Nos. 91-5054 & 5945

INS No. A30-257-519

MARIO CERNA,

Petitioner,

versus

IMMIGRATION AND NATURALIZATION SERVICE,

Respondent.

Petition for Review of an Order of the
Immigration and Naturalization Service

(November 9, 1992)

Before FAY and EDMONDSON, Circuit Judges, and HILL, Senior Circuit Judge.

PER CURIAM:

Because we cannot say the Board either failed to exercise its discretion or abused its discretion in ordering Cerna's deportation or in denying Cerna's motion to reopen and to reconsider, the Board's orders are AFFIRMED.